Muhammad Adib Sufyan bin Azman v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO BA-42S-83–12 OF 2017
AHMAD FAIRUZ JC
12 MARCH 2019

Criminal Law — Appeal — Appeal against conviction and sentence — Carnal intercourse against order of nature — Elements to be proven — Whether elements of offence proven — Whether trial judge ought to invoke adverse inference for non-calling of witness — Whether defence failed to raise reasonable doubt — Whether finding of guilt by trial judge correct in fact and law — Penal Code s 377C

Criminal Procedure — Defence — Alibi — Whether ten-day notice ought to be given — Whether defence of alibi by appellant raised doubt on prosecution's case — Criminal Procedure Code s 402A

Evidence — Witness — Child witness — Competency of a child witness — Admissibility of video recording of child witness — Corroboration of evidence — Whether evidence of child witness required corroboration — Evidence Act 1950 s 133A — Evidence of Child Witness Act 2009 s 6

This was an appeal against the decision of the sessions court judge in convicting the appellant under s 377C of the Penal Code and sentenced to 15 years imprisonment and six strokes of the cane. The case was based on the testimony of SP7 who was the victim, that sometime in July 2014 when he was 13 years old, he was a student at a Tahfiz located at Ukay Perdana, Ampang, Kuala Lumpur. SP7 was called by the appellant to come up to the appellant's room where the appellant had asked SP7 to lie down and the appellant performed oral sex on SP7. Subsequently SP7 was asked by the appellant to perform oral sex on him. The act of the appellant inserting his penis into the mouth of SP7 was the essence of the charge against the appellant. In 2015, SP7 told his parents about the incident and eventually lodged a police report. In addition to the testimony by SP7, the prosecution also relied on the testimony by SP2 and SP6. SP6 was the officer in charge of carrying out the recording of the interview at the Child Investigation Centre ('the CIC'). The case of the defence was based on an alibi where the appellant stated that he was not at the Tahfiz on the day and time as stated in the charge. During his defence, the appellant failed to call the person named in the Alibi Notice but instead another witness Mohd Irfan Zahin Azhar (SD2) was called. SD3 was also called and laid down the

foundation that the entire incident involving the allegation of abuse at the Tahfiz was orchestrated by persons who had issues with her husband, SD4. SD4 testified that the Tahfiz was a victim of a conspiracy perpetrated by several parties who had been involved in the theft of cheques belonging to SD4 and also claimed that his signature was forged on some cheques. As such, the defence was one of a denial of the incident ever occurring as claimed by SP7 and that the entire allegation relating to the issue of abuse of students at the Tahfiz was perpetrated by several persons including SP4 who had issues with SD4. The appeal challenged the conviction on the following grounds: (a) the learned sessions court judge took into account evidence which was prejudicial to the appellant. This was based on the fact that during the trial, incidents not relating to the charge was also before the court which resulted in the learned sessions court judge being influenced by evidence unrelated to the charge; (b) corroboration was wrongly considered by the learned sessions court judge and that s 157 of the Evidence Act 1950 was wrongly applied; (c) the non-calling of a student in the Tahfiz resulted in the application of an adverse inference; and (d) there was no proper appreciation of the defence.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The prosecution was required to prove the following: (a) that the appellant committed carnal intercourse against the order of nature as defined under s 377A of the Penal Code; (b) that the act was committed without the consent or against the will of SP7; and (c) that there was penetration (see para 13).

(2) The evidence given by SP7 at the CIC was clear. Not only did SP7 narrated how the incident occurred, SP7 could also demonstrate with the aid of dolls, how it happened. This re-enactment albeit using dolls, was clear evidence of how the incident took place. It showed that the incident was clear in the mind of SP7 and he could relate the ordeal by demonstrating what he meant by conducting the re-enactment of the incident. The introduction of the appellant's penis into the mouth of SP7 fulfilled the definition of carnal intercourse against the order of nature. Penetration was also established (see paras 20–21).

(3) The necessary pre-requisites of s 6 of the Evidence of Child Witness Act 2009 ('the ECWA') had been fulfilled by the prosecution. The evidence of SP2 and SP6 clearly showed that there was transcript of the video recording admitted as P9 and the certificate issued by SP6 who made the video was admitted as P14 was in conformity with the requirements of s 6(3) of the ECWA. As such, the video recording of SP7's testimony at the CIC could be admitted as SP7's testimony in the trial. This was in addition to the testimony of SP7 during the further examination-in-chief by the deputy public prosecutor. Although SP7 had attained the age of 16 at the time of him testifying in court, the recording of his evidence was

admissible subject to it being proved as provided under s 7 of the ECWA. The recording was sufficiently proven by the prosecution (see paras 37–38).

(4) The nature of this trial would invariably involve evidence that may not be relevant to the charge but were inextricably related to the sequence of events. It was the role of the trial judge to sieve through the relevant evidence and state as a matter of fact that she or he had consciously focused only on the relevant facts that relate to the charge. This was certainly done by the trial judge (see para 42).

(5) The testimony of SP7 did not requires corroboration. This was primarily due the fact that SP7 gave evidence under oath. It was ascertained by the learned sessions judge that he was a person who understood the nature of taking an oath. As such, there was no requirement under the law for corroboration (see para 47).

(6) There was an error on the part of the learned sessions judge when she readily ruled that the evidence of SP1 and SP2 corroborated SP7. SP1 and SP2 were merely collecting and collating evidence that came from SP7, the source of the said information. It was not independent evidence that implicated the appellant. To agree with the learned sessions judge would mean any person who was told by a victim of his account of the events was a corroborative witness. There was also an error when the learned sessions court judge held the evidence of SP7 video recording corroborated SP7's testimony (see paras 51–52).

(7) There was no ulterior motive for not producing the witness Busri. The failure to produce the said witness was not in any manner a deliberate scheme to impair the truth or frustrate the appellant's defence. It was the prosecution's discretion in wanting to prove its case. In so doing, it was solely the prerogative of the prosecution to determine who it intended to call to prove its case (see paras 63–64).

(8) There was no longer the requirement of a ten day notice period. With the removal of the phrase 'shall not be admitted' (as provided under the repealed s 402A of the Criminal Procedure Code ('the CPC')), alibi evidence can be considered even if such notice was not given at case management stage subject to the said notice conforming to s 402A(3)(a) and (b) of the CPC. Nevertheless, the requirement of what was to contain in the notice remained unchanged. By producing a witness who was not named in the alibi notice ie SD2, the appellant had deprived the police from ascertaining the veracity of the alibi defence. In the circumstances, the alibi defence which was anchored to SD2's evidence had failed to raise a doubt on the prosecution's case (see paras 69–71 & 75).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan hakim mahkamah sesyen yang mensabitkan perayu dibawah s 377C Kanun Keseksaan dan dihukum dengan 15 tahun pemenjaraan dan enam sebatan rotan. Kes ini berdasarkan keterangan SP7 yang merupakan mangsa, bahawa pada satu masa dalam Julai 2014 semasa dia berusia 13 tahun, dia merupakan pelajar di satu tahfiz yang terletak di Ukay Perdana, Ampang, Kuala Lumpur. SP7 telah dipanggil oleh perayu untuk naik ke bilik perayu yang mana perayu meminta SP7 untuk baring dan perayu telah melakukan seks oral keatas SP7. Kemudian, SP7 telah diminta oleh perayu untuk melaksanakan seks oral keatasnya. Tindakan perayu memasukkan zakarnya ke dalam mulut SP7 merupakan asas pertuduhan terhadap perayu. Pada tahun 2015, SP7 memaklumkan keluarganya mengenai insiden tersebut dan kemdiannya telah membuat satu laporan polis. Selain daripada keterangan SP7, pendakwaan juga bergantung kepada keterangan SP2 dan SP6. SP6 merupakan pegawai yang bertanggungjawab untuk melaksanakan rakaman temubual di Pusat Siasatan Kanak-Kanak (CIC). Kes pembelaan berdasarkan alibi yang mana perayu menyatakan bahawa dia tidak berada di tahfiz pada hari dan masa yang dinyatakan dalam pertuduhan. Sewaktu pembelaan, perayu gagal untuk memanggil penama yang dinamakan dalam notis alibi namun sebaliknya seorang lagi saksi Mohd Irfan Zahin Azhar (SD2) dipanggil. SD3 turut dipanggil dan telah meletakan asas yang keseluruhan insiden mengenai alegasi cabul di tahfiz tersebut didalangi oleh individu yang mempunyai masalah dengan suaminya, SD4. SD4 memberi keterangan bahawa Tahfiz tersebut merupakan mangsa konspirasi yang didalangi oleh beberapa pihak yang terlibat dengan kecurian cek-cek yang merupakan milik SD4 dan juga menyatakan bahawa tandatangannya dipalsukan pada beberapa cek. Oleh itu, pembelaan merupakan satu penafian insiden tersebut pernah berlaku sepertimana dinyatakan oleh SP7 dan keseluruhan alegasi berkaitan dengan isu pencabulan pelajar di tahfiz tersebut didalangi oleh beberapa individu termasuk SP5 yang mempunyai masalah dengan SD4. Pembelaan mencabar sabitan atas alasan-alasan berikut: (a) hakim mahkamah sesyen terpelajar mengambil kira keterangan yang memprejudiskan perayu. Ini adalah berdasarkan fakta yang sewaktu perbicaraan, insiden tidak berkaitan dengan pertuduhan juga dikemukan kehadapan mahkamah yang menyebabkan hakim mahkamah terpelajar dipengaruhi dengan keterangan yang tidak berkaitan dengan pertuduhan; (b) sokongan telah ditimbangkan secara salah oleh hakim mahkamah sesyen dan s 157 Akta Keterangan 1950 digunakan secara salah; (c) tindakan tidak memanggil seorang pelajar di tahfiz tersebut menyebabkan pemakaian tanggapan salah; dan (d) tiada pengimbangan yang sewajarnya kepada pembelaan.

Diputuskan, mengetepikan rayuan dan mengekalkan sabitan dan hukuman:

(1) Pendakwaan dikehendaki untuk membuktikan yang berikut: (a) bahawa

peraya telah melakukan persetubuhan menentang hukum alam sepertimana ditakrifkan dibawah s 377A Kanun Keseksaan; (b) bahawa pelakuan tersebut dilakukan tanpa keizinan SP7; dan (c) wujud kemasukkan (lihat perenggan 13).

(2) Keterangan yang diberikan SP7 di CIC tersebut adalah jelas. Bukan sahaja SP7 menceritakan bagaimana insiden tersebut berlaku, SP7 juga dapat menunjukan dengan menggunakan bantuan patung, adalah keterangan jelas bagaimana insiden tersebut berlaku. Pembuatan semula, walaupun menggunakan patung. Kemasukan zakar perayu kedalam mulut SP7 memenuhi takrifan persetubuhan menentang hukum alam. Kemasukan juga dibuktikan (lihat perenggan 20–21).

(3) Prasyarat wajib dibawah s 6 Akta Keterangan Saksi Kanak-Kanak 2009 ('AKSK') telah dibuktikan telah dipenuhi oleh pendakwaan. Keterangan SP2 dan SP6 jelas menunjukan bahawa terdapat transkrip rakaman video yang diterima sebagai P9 dan sijil yang dikeluarkan SP6 yang membuat video tersebut yang diterima sebagai P14 adalah memenuhi keperluan s 6(3) AKSK. Oleh itu, rakaman video keterangan SP7 di CIC boleh diterima sebagai keterangan SP7 sewaktu perbicaraan. Ini adalah tambahan kepada keterangan SP7 semasa pemeriksaan utama lanjut oleh timbalan pendakwa raya. Walaupun SP7 telah mencapai umur 16 tahun di masa dia memberi keterangan di mahkamah, rakaman keterangannya boleh diterima pakai tertakluk kepada ianya dibuktikan dibawah s 7 AKSK. Rakaman tersebut telah dibuktikan secara mencukupi oleh pendakwaan (lihat perenggan 37–38).

(4) Sifat perbicaraan ini akan melibatkan keterangan yang mungkin tidak relevan kepada pertuduhan tetapi berkaitan dengan rentetan kejadian. Ianya merupakan peranan hakim bicara untuk meneliti keterangan yang relevan dan menyatakan sebagai fakta bahawa dia telah secara sedar memberi perhatian hanya kepada fakta yang relevan berkaitan dengan pertuduhan dan perkara ini sememangnya dilakukan oleh hakim bicara (lihat perenggan 42).

(5) Keterangan SP7 tidak memerlukan sokongan. Ini adalah berdasarkan fakta bahawa SP7 memberikan keterangan bersumpah. Ianya ditentukan oleh hakim mahkamah sesyen terpelajar bahawa dia merupakan individu yang memahami sifat sumpah yang diambil. Oleh itu, tiada keperluan undang-undang untuk sokongan (lihat perenggan 47).

(6) Wujud kekhilafan di pihak hakim mahkamah sesyen apabila dia memutuskan bahawa keterangan SP1 dan SP2 menyokong SP7. SP1 dan SP2 hanya mengumpul keterangan yang datang dari SP7, sumber maklumat tersebut. Ianya bukan keterangan bebas yang membabitkan perayu. Untuk bersetuju dengan hakim mahkamah sesyen terpelajar akan bermaksud apa-apa individu yang diberitahu oleh seorang mangsa

versi rentetan peristiwanya merupakan saksi sokongan. Wujud juga kekhilafan apabila hakim mahkamah sesyen terpelajar memutuskan keterangan rakaman video SP7 menyokong keterangan SP7 (lihat perenggan 51–52).

(7) Tiada motif tersembunyi untuk tidak mengemukakan saksi Busri. Kegagalan untuk mengemukakan saksi tersebut bukan merupakan satu skim yang sengaja untuk menyorok kebenaran atau menggagalkan pembelaan perayu. Adalah menjadi budibicara pendakwaan dalam membuktikan kesnya. Dalam melakukan sedemikian, ianya merupakan prerogatif mutlak untuk menentukan siapa ianya berniat untuk memanggil untuk membuktikan kesnya (lihat perenggan 63–64).

(8) Tiada lagi keperluan tempoh notis sepuluh hari. Dengan pengeluaran frasa 'tidak akan diterima' (seperti mana ditetapkan dibawah s 402A Kanun Tatacara Jenayah ('KTJ')) yang tidak lagi berkuat kuasa), keterangan alibi boleh dipertimbangkan walaupun notis sedemikian tidak diberikan di peringkat pengurusan kes tertakluk kepada notis tersebut mematuhi s 402A(3)(a) dan (b) KTJ. Namun, keperluan apa yang perlu terkandung dalam notis tidak berubah. Dengan mengemukakan saksi yang tidak dinamakan dalam notis alibi, iaitu SD2, perayu telah menafikan pihak polis untuk menentukan kesahihan pembelaan alibi tersebut. Dalam keadaan ini, pembelaan alibi yang berlandaskan keterangan SD2 gagal untuk menimbulkan keraguan terhadap kes pendakwaan (lihat perenggan 69–71 & 75).]

Notes

For cases on alibi, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2203–2241.

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

For cases on child witness, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3403–3419.

Cases referred to

Adel Muhammed El Dabbah v Attorney-General of Palestine [1944] 2 All ER 139; [1944] AC 156, PC (refd)

Ah Mee v PP [1967] 1 MLJ 220; [1967] 1 LNS 3, FC (refd)

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)

Amin bin Hatai v PP [2017] MLJU 98; [2017] 1 LNS 87, CA (refd)

Chao Chong & Ors v PP [1960] 1 MLJ 238, CA (refd)

Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)

Chia Han Kiat v Rex [1937] 1 MLJ 261 (refd)

DA Duncan v PP [1980] 2 MLJ 195, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 149, FC (refd)

Ghasem Hozouri Hassan v Pendakwa Raya [2018] MLJU 601; [2018] 6 CLJ 133, FC (refd)
Javad Safikhani v PP [2017] 3 MLJ 511; [2017] 6 CLJ 604, CA (refd)
Khoon Chye Hin v PP [1961] 1 MLJ 105b, CA (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14, AC (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38; [1984] 2 CLJ 219; [1984] 1 CLJ Rep 207, FC (refd)
Mohamad bin Deraman v PP [2011] 3 MLJ 289, CA (refd)
Mohamed Alias v PP [1983] 2 MLJ 172 (refd)
Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ 875, CA (refd)
Mohd Zuki bin Ali @ Mohamad v PP [2010] MLJU 1320; [2010] 1 LNS 1270, HC (refd)
Muharam bin Anson v PP [1981] 1 MLJ 222; [1980] 1 LNS 137, FC (refd)
Pendakwa Raya lwn Mohamad Malek Ridhzuan bin Che Hassan [2014] 1 MLJ 363; [2013] 1 LNS 447, CA (refd)
PP v Chan Wai Heng [2008] 5 MLJ 798; [2008] 5 CLJ 805, CA (refd)
PP v Dato' Harun Idris [1979] 1 MLJ 15 (refd)
PP v Lim Kuan Hock [1967] 2 MLJ 114 (refd)
PP v Ma' Arif [1969] 2 MLJ 65 (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79; [1970] 1 LNS 121, FC (folld)
Sabli bin Adin & Ors v PP [1978] 1 MLJ 210; [1977] 1 LNS 113, FC (refd)
Samsudin v PP [1962] 1 MLJ 405, CA (refd)
Santosh Roy v State of West Bengal 1992 CriLJ 2493 (Cal) (refd)
State of MP v Deoki Nandan 1987 CriLJ 1016 (refd)
The King v Baskerville [1916] 2 KB 658 (refd)
Vadivelu Thevar v State of Madras 1957 AIR 614 (refd)
Vasan Singh v PP [1988] 3 MLJ 412; [1989] 1 CLJ Rep 166, SC (folld)
Vinuthen Asoka Kumaran v PP (42S-38–07 of 2017) (unreported) (refd)

Legislation referred to

Child Act 2001
Criminal Procedure Code ss 402A, 402A(2), (3)(a), (3)(b), (4), 402B
Evidence Act 1950 ss 114(g), 118, 133A, 134, 157
Evidence of Child Witness Act 2009 ss 2, 6, 6(1), (3), (7), (8), 7
Penal Code ss 377A, 377C

PG Cyril (Vignesh Kumar & Assoc) for the appellant.
Rizal Azani (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the respondent.

Ahmad Fairuz JC:

INTRODUCTION

[1] The appellant was charged under s 377C of the Penal Code for committing carnal intercourse against the order of nature at the Ampang Sessions Court. The appellant claimed trial and at the end of the trial, the learned session court judge ('LSJ') found the appellant guilty and sentenced him to 15 years imprisonment and impose six strokes of whipping. This court dismissed the appeal and affirmed the sentence of the LSJ. The appellant now appeals to the Court of Appeal and this is the grounds of decision of this court.

[2] The charge:

> Bahawa kamu pada pertengahan bulan Julai 2014 jam lebih kurang 4.00 petang di sebuah bilik di alamat PUSAT TAHFIZ AL-NASAR, NO 59 JALAN SEIRRA UKAY 5, TAMAN SEIRRA UKAY, UKAY PERDANA 68000 AMPANG, di dalam daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan, didapati dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii terhadap seorang lelaki bernama AHMAD RASYIDI BIN MOHD MURAD, NO KP : 010304-14-0061 dengan tanpa kerelaannya atau bertentangan dengan kemahuannya. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 377C Kanun Keseksaan (Akta 574).

THE PROSECUTION CASE

[3] The prosecution case was primarily based on the testimony of the victim Ahmad Rasyidi bin Mohd Murad ('SP7'). SP7 gave evidence that he incident relating to the charge took place sometime in the month of July 2014. At that time, he was 13 years old. He testified that he was a student at the Tahfiz, located at Ukay Perdana, Ampang, Kuala Lumpur. On the day of the incident, SP7 testified that he was called by the appellant to come up to the appellant's room. Upon entering the room, he saw several boys massaging the hands and legs of the appellant. The appellant then asked the other boys to leave the room, leaving SP7 and the appellant alone in the room. SP7 testified that he heard the room being locked as the boys left. SP7 was then asked to massage the appellant. The appellant then asked SP7 to lie on the bed next to him. The appellant then performed oral sex on SP7. Subsequently, the appellant then asked SP7 to perform oral sex on him. This was done by the appellant standing up and SP7 kneeling. The appellant then inserted his penis into the mouth of SP7. SP7 testified that the incident was over quickly and as he left the room, he was warned by the appellant to not inform anyone of the incident. The act of the appellant inserting his penis into the mouth of SP7 was the essence of the charge against the appellant.

[4] It was many months later, sometime in 2015 that SP7 told the incident to his parents and eventually lodged a police report P1. This was after allegations of abuse by staff of the Tahfiz on the students broke out. The catalyst being after one of the students who ran away from the school over an alleged incident of a similar nature.

[5] The prosecution called six other witnesses. Insp Nur Zawanie bt Zakaria ('PW1') was a police officer who was the investigating officer of the case. Insp Rashila bt Harun ('PW2') was the police officer who interviewed SP7 at the Child Investigation Center ('CIC'). Kpl Masdzir bin Mohamed ('PW3') was the police personnel who served on the appellant the medical report of SP7. Mohd Izuddin bin Johari ('SP4') was a staff of the Tahfiz and also the brother-in-law of the appellant. L/Kpl Mohd Fauzi bin Mohd Noor ('SP5') was the photographer. Insp Veeramuthu a/l Suppiah ('SP6') was the officer in charge of carrying out the recording of the interview at the CIC.

THE DEFENCE CASE

[6] The defence of the appellant was based on an alibi that he was not at the Tahfiz on the day and time as stated in the charge. This was due to it being a fasting month, he was helping one Mohd Fakhruzi sell *Roti John* at the local *Bazaar Ramadan*. During his defence, he failed to call the person named in the alibi notice but instead another witness Mohd Irfan Zahin Azhar ('SD2') was called. SD2 testified to say that the appellant was not at the Tahfiz but was selling *Roti John* during the period mentioned in the charge. The mother of the appellant also testified as Sabariah bt Sungib ('SD3'). In essence, she laid down the foundation that the entire incident involving the allegation of abuse at the Tahfiz was orchestrated by persons who had issues with her husband Azman bin Hassan ('SD4'). SD4 also testified that the Tahfiz was a victim of a conspiracy perpetrated by several parties who had been involved in the theft of cheques belonging to SD4 and also claimed that his signature was forged on some cheques. As such, the defence was one of a denial of the incident ever occurring as claimed by SP7 and that the entire allegation relating to the issue of abuse of students at the Tahfiz was perpetrated by several persons including SP4 who had issues with SD4.

THE APPEAL

[7] Before this court, counsel for the appellant challenged the conviction on several fronts. Foremost, was the issue of the LSJ taking into account evidence which was prejudicial to the appellant. This was based on the fact that during the trial, incidents not relating to the charge was also before the court. It was argued that this had resulted in the LSJ being influenced by evidence unrelated to the charge.

[8] Counsel also argued that corroboration was wrongly considered by the LSJ. It was contended that the LSJ wrongly applied s 157 of the Evidence Act 1950 when she relied on the statement of SP7 which was given to the police at the Child Interview Center ('CIC') as corroboration. This according to counsel, was a misdirection in law as at best, it is evidence of consistency rather than corroboration.

[9] Counsel argued that the non-calling of Busri, a student at the Tahfiz resulted in the application of s 114 illustration (g) of the Evidence Act 1950. It was contended that as Busri was mentioned by the prosecution witness, he ought to have been called as a witness by the prosecution.

[10] Counsel also argued that there was no proper appreciation of the appellant's defence by the LSJ when she rejected the defence of the appellant and went on to convict him.

THE OFFENCE

[11] Section 377C of the Penal Code reads as follows:

> 377C Committing carnal intercourse against the order of nature without consent, etc
>
> Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be punished with whipping.

[12] Carnal intercourse against the order of nature is defined as:

> Section 377A Carnal intercourse against the order of nature.
>
> Any person who has sexual connection with another person *by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature*.
>
> Explanation — Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.

[13] Therefore, in the current appeal, the prosecution is required to prove the following:

(a) that the appellant committed carnal intercourse against the order of nature as defined under s 377A of the Penal Code;

(b) that the act was committed without the consent or against the will of SP7; and

(c) that there was penetration.

[14] As a broad guidance, *Vohrah and Hamid on the Malaysia Penal Code* (Printworks Publishing, 2006) outlined the ingredients required to be proven by the prosecution. It states as follows:

> PRACTICE
>
> The prosecution has to prove the following:
>
> 1. That the accused had carnal intercourse with a man or woman.
> 2. That such intercourse was against the order of nature.
> 3. That such intercourse was carried out without the consent, or against the will, of the other person.
> 4. That the accused put the other person in fear of death, or hurt to that person or any other person.
> 5. That the accused did the act voluntarily.
> 6. That there was penetration.

DUTY OF AN APPELLATE COURT

[15] It is a settled principle of law that when a case comes before an appellate court, the said matter takes the form of a continuation of a trial and it is open to the appellate court to order or determine if the various findings of the trial court are correct (see *Public Prosecutor v Ma' Arif* [1969] 2 MLJ 65; *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; *Mohamad bin Deraman v Public Prosecutor* [2011] 3 MLJ 289). In the circumstances, it was open to this court to review the entire case and the relevant evidence as presented at the trial court.

[16] It is never the less, guided by the principle that an appellate court should be slow in disturbing the finding of facts of a trial court (*Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79; *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875).

[17] However, the power of an appellate court to interfere with a finding cannot be disputed (see *Public Prosecutor v Lim Kuan Hock* [1967] 2 MLJ 114). The duty of an appellate court judge is to be a judge of fact and law and it would be abrogating its functions if it made a hard and fast rule never to interfere with findings of fact and felt bound to support a judgment which on review of all the evidence is considered to be clearly wrong (see *Vinuthen Asoka Kumaran v Public Prosecutor* (42S-38–07 of 2017) (unreported); *Chia Han Kiat v Rex* [1937] 1 MLJ 261).

ANALYSIS

Whether the ingredients of the offence have been fulfilled

[18] This court is of the opinion that the LSJ had rightly determined that the ingredients of s 377C of the Penal Code had been made out by the prosecution. The LSJ correctly assessed the witnesses and had found it as a fact that there was an introduction of the appellant's penis into the mouth of SP7. A reading of the notes of evidence and the relevant pages of the transcript of the video recording (P9) also shows how the said carnal intercourse occurred.

[19] The notes of evidence at pp 109–112 of *Jld* 2(a) of the appeal records shows as follows:

Q : Lepas itu apa yang berlaku.

A : Lepas urut kepala Ustaz Adib, Uztaz suruh saya hisap kemaluan dia.

Q : Ustaz siapa.

A : Ustaz Adib.

Q : Ustaz Adib suruh hisap kemaluan.

A : Emm.

Q : Macam mana dia cakap perkara ini dekat Rasyidi.

A : Masa baring.

Q : Siapa masa itu tengah baring.

A : Ustaz Adib.

Q : Ayat yang digunakan itu macam mana. Apa yang dia cakap dengan Rasyidi.

A : Ustaz Adib suruh hisap kemaluan dia sikit.

Q : Bila Ustaz Adib suruh Rasyidi buat sedemikian, apa reaksi Rasyidi.

A : Saya tak nak buat.

Q : Dia cakap dengan nada macam mana.

A : Nada biasa.

Q : Lepas itu apa berlaku.

A : Ustaz Adib bangun, tolak kepala saya suruh hisap kemaluan Ustaz Adib.

Q : Rasyidi kata lepas itu Ustaz Adib bangun, dia bangun macam mana, dari mana.

A : Daripada katil bangun berdiri.

Q : Masa itu Ustaz Adib pakai apa.

A : Kain pelikat dengan baju t-shirt.

Q : Masa itu Rasyidi berada di mana.

A : Dekat lantai melutut.

Q : Sejak bila Rasyidi di atas katil melutut ini sebab sebelum ini Rasyidi kata Rasyidi pernah urut kepala Ustaz.

A : Ya.

Q : Urut itu masa itu dalam keadaan macam mana.

A : Duduk.

Q : Duduk di mana.

A : Katil.

Q : Dan bila masanya Rasyidi berada di lantai melutut pula.

A : Lepas Ustaz Adib bangun dari katil.

Q : Siapa suruh Rasyidi untuk melutut di lantai.

A : Saya sendiri.

Q : Rasyidi kata lepas Ustaz Adib bangun tolak kepala Rasyidi untuk hisap kemaluan dia.

A : Emm.

Q : Masa itu Rasyidi dalam keadaan melutut. Macam mana dia tolak kepala Rasyidi.

A : Dia berdiri, tolak daripada belakang.

Peguam : Puan Hakim, tadinya mangsa tidak kata dia tolak kepala.

TPR : Ada puan.

Mahkamah : Ada. Ustaz Adib bangun tolak kepala saya suruh hisap kemaluan ustaz. Dia ada sebut tadi.

Q : Macam mana dia tolak kepala Rasyidi.

A : Masa berdiri itu dia tolak kepala saya dari belakang.

Q : Rasyidi boleh tunjukkan cara dia tolak kepada Rasyidi dari belakang.

A : Masa berdiri itu dia tolak.

Q : Rasyidi cuba berdiri. Boleh tunjukkan macam mana.

A : Dia tolak macam ini. — Saksi menunjukkan cara tolakan — (rujuk CRT)

TPR : Pohon rekodkan puan.

Mahkamah : Jadi masa berdiri tadi, konon-konon Rasyidi itu siapa.

A : Ustaz.

Q : Ustaz siapa.

A : Adib.

Q : Rasyidi menyatakan Ustaz Adib itu pakai t-shirt dan juga kain pelikat. Masa dia tolak itu, kain pelikat dia macam mana.

A : Dia angkat ke atas.

Q : Dia itu siapa yang angkat kain.

A : Ustaz Adib.

Q : Bila Ustaz Adib angkat kain pelikat ke atas, apa yang Rasyidi nampak. **A**

A : Kemaluan dia.

Q : Nampak kemaluan dia macam mana.

A : Lembik.

Q : Rasyidi kata Ustaz Adib berdiri tolak kepala Rasyidi dari belakang. Tolak ke arah mana. **B**

A : Kemaluan.

Q : Kemaluan siapa.

A : Ustaz Adib. **C**

Q : Bila tolak kepala Rasyidi ke arah kemaluan Ustaz Adib, apa yang Rasyidi lakukan.

A : Hisap kemaluan Ustaz Adib.

Q : Masa hisap itu tangan dia masih kat belakang kepala Rasyidi atau macam mana. **D**

A : Tidak.

Q : Rasyidi hisap berapa lama.

A : Sekejap.

Q : Masa itu apa perasaan Rasyidi. **E**

A : Takut.

Q : Rasyidi kata Rasyidi hisap sekejap lepas itu apa yang berlaku.

A : Saya terus keluar bilik.

Q : Rasyidi kata dalam bilik Ustaz Adib ini Rasyidi disuruh hisap kemaluan Ustaz Adib. Ada apa-apa lain yang berlaku selain dari Rasyidi hisap kemaluan Ustaz Adib. **F**

A : Tidak.

Q : Rasyidi kata terus keluar dari bilik, lepas keluar dari bilik tersebut apa yang Rasyidi lakukan.

A : Terus pergi surau. **G**

Q : Apa yang Rasyidi rasa selepas kejadian tersebut.

A : Rasa takut.

Q : Takut dengan apa.

A : Dengan Ustaz Adib. **H**

Further at paras 136–182 of P6, it reads as follows:

PT : Kemaluan, kemudian?

M : Kemudian ustaz suruh saya pulak. **I**

PT : Syidi hisap tak?

M : Erm hisap sekejap je.

PT : Boleh tak Syidi tunjuk dengan akak macamana ustaz buat dekat Syidi dengan Patung, boleh?

M : Boleh.

PT : Boleh, ambik

M : (Mangsa bangun dan ambil dua buah anak patung lelaki dan duduk semula di sofa. Selepas itu mangsa telah letakkan anak patung budak lelaki di atas meja dan mangsa telah buka pelekat baju anak patung lelaki dewasa dan mangsa telah keluarkan kemaluan anak patung lelaki dewasa).

PT : Sebelum itu akak nak tanya yang ni siapa? (sambil tunjuk anak patung lelaki dewasa)

M : Aah Adib.

PT : Adib?

M : Emm.

PT : Yang ni (sambil tunjuk anak patung budak lelaki)

M : Syidi.

PT : Syidi?

M : Emm.

PT : Ok.

M : Mula aah Syidi punya dulu (sambil letakkan muka anak patung lelaki dewasa di kemaluan anak patung budak lelaki) macam ni baring dia hisap.

PT : Posisi macam tu ke?

M : Hah. Pas tu aah ustaz berdiri dekat lantai pas tu hisap (sambil berdirikan anak patung lelaki dewasa dan letakkan muka anak patung budak lelaki di kemaluan anak patung lelaki dewasa.

PT : Aak ustaz ada bukak seluar tak?

M : Hah ustaz bukak sendiri.

PT : Boleh tak aah Syidi bukak macamana apa yang ustaz buat.

M : Dia bukak macam ni (sambil turunkan sedikit seluar anak patung lelaki dewasa) lepas tu saya duduk dia suruh hisap (sambil letakkan anak patung budak lelaki di kemaluan anak patung lelaki dewasa).

PT : Syidi punya seluar macamana?

M : Dah masuk dah, dah tutup.

PT : Masa ustaz hisap tu macamana seluar Syidi?

M : Dah, dah tutup dah.

PT : Bukak habis ke bukak?

M : Sikit je.

PT : Sikit macam tu?

M : Ehmm.

PT : Ok tadi Syidi beritahu aah nama ustaz tu ustaz Adib Sofian.

M : Emm

PT : Betul? A

M : Betul.

PT : Ada apa-apa lagi yang Adib nak, aah Syidi nak beritahu dengan akak tak?

M : Tak.

PT : Tak ada. Apa perasaan Syidi selepas ustaz tu buat Syidi macam tu? B

M : Macam ...,perasaan macam sedih ah. Tu je.

PT : Ada tak siapa-siapa lagi yang buat macam tu dekat Syidi selain ustaz?

M : Tak ada.

PT : Ok aah terima kasih aah Syidi kerana beri kerjasama dengan akak hari ini. C

M : Sama-sama.

PT : Sesi rakaman tamat pada 25 haribulan 11, 2015 jam 12.23 tengahari.

[20] The evidence given by SP7 at the CIC was clear. Not only did SP7 narrate how the incident occurred, SP7 could also demonstrate with the aid of dolls, how it happened. This re-enactment albeit using dolls, is clear evidence of how the incident took place. It showed that the incident was clear in the mind of SP7 and he could relate the ordeal by demonstrating what he meant by conducting the re-enactment of the incident. D E

[21] From the evidence of SP7, there was an introduction of the appellant's penis into the mouth of SP7. This fulfilled the definition of carnal intercourse against the order of nature. Penetration was also established. F

[22] Reading in totality, it was evident that the act was done without the consent of SP7. It was stated in evidence that SP7 was warned by the appellant to not tell anyone. The warning must be viewed from the context of a 13-year-old boy being warned by his adult teacher. In the context of the Tahfiz environment, the respect and the deference given to elders must also be factored in. Reading the entire notes of evidence will also show that SP7 never consented to the act. As such, all the ingredients of s 377C has been proven by the prosecution. G

[23] The LSJ as the trial judge had the advantage of observing the demeanour of SP7 throughout the trial. SP7 also demonstrated in court how the appellant pushed his head to the appellant's private parts/groin. The LSJ had also the benefit of viewing the entire recording of the interview (P9). The benefit of appreciating the testimony of SP7 must be given to the LSJ as she had the benefit of hearing and observing SP7 directly. H I

Admitting child evidence in court

[24] The crux of the case rests on the reception of SP7's evidence who at the time of the incident was 13 years old. At the time of trial, he was over 16 years of age. The definition of a child can be found in several legislation. Article 1 of the United Nations Convention on the Rights of the Child (1989) defines children as all human being under the age of 18. The Child Act 2001 defines a child as someone below the age of 18. The Evidence of Child Witness Act 2009 defines a child to be someone under the age of 16.

[25] It is essential that in every trial involving a child witness, the competency of a child testifying must be ascertained. An inquiry must be done by the trial judge to determine if the child witness is competent to either testify under oath and be allowed to give sworn testimony, or be allowed to give unsworn evidence in court (see the Federal Court case of *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222 at p 223; [1980] 1 LNS 137).

[26] Section 118 of the Evidence Act 1950 ('the EA') provides the start point where the competency of witnesses are concerned. It provides that all persons are competent to testify unless they are, in the opinion of the court, unable to understand the questions put to them or unable to give rational answers to those questions owing to tender years, extreme old age, disease of mind or body, or any other such cause.

[27] The intellectual capacity of a child to understand questions and to give rational answers is the sole test of his testimonial competency and not any particular age (see *Santosh Roy vs State of West Bengal* 1992 CriLJ 2493 (Cal)). It depends upon the exercise of the trial judge's discretion upon exercising his judgement on the competency of the child (see *State of MP v Deoki Nandan* 1987 CriLJ 1016).

[28] The requirement on how to deal with child witnesses was stated as early as in the case of *Chao Chong & Ors v Public Prosecutor* [1960] 1 MLJ 238, per Thomson CJ (as he then was):

> One reason why children's evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. In this country where evidence is taken on affirmation that consideration loses much of its force. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination. In our view something of the sort should have been put to the jury. At the very lowest they should have been invited to consider their own experience in connection with stories told by children. It was not sufficient merely to observe that there is a risk in

acting on the uncorroborated evidence of a child. In any event we have grave doubts as to whether even so far as it goes that observation is strong enough. As was said by Lord Goddard in the case of *Mohamed Sugal Esa v The King*:

It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.

[29] The introduction of s 133A of the Evidence Act 1950 ('s 133A') in 1971 saw the development of the said provision being discussed in many cases. The focus of the provision is on assessing the competency of a child witness, in particular children of tender years. In *Public Prosecutor v Chan Wai Heng* [2008] 5 MLJ 798; [2008] 5 CLJ 805 it was held that:

[15] Section 133A refers to a situation where a child of tender years is called as a witness and does not understand the nature of an oath. In such a situation his evidence may still be received though not given upon oath if in the opinion of the court he possesses sufficient understanding to justify the reception of the evidence, and the child understands the duty of speaking the truth.

[16] The first part of s 133A therefore governs the admissibility of the evidence of the child though not given under oath. The proviso deals with the way in which the evidence once admitted is to be treated, that is, where the evidence admitted as such is given on behalf of the prosecution, the proviso requires that the evidence is to be corroborated by some other material evidence in support thereof in order to implicate the accused. (Emphasis added.)

Heliliah JCA went on to explain as follows:

... Once a witness is found to be a competent witness, even if he is not competent to take an oath or if there is an omission to take an oath that will not invalidate the proceedings or render inadmissible the evidence. *The rule generally is in favour of admission of evidence though the weight to be attached to it will naturally be a matter for consideration by the court. There is always competency unless the court considers otherwise. If a witness is not competent he will not be examined in court. In the case of a child, it depends on the capacity of the child, his appreciation of the difference between truth and falsehood as well as his duty to tell the former. The decision of this question rests with the trial judge, who sees the proposed witness, notices his manner, his apparent possession, or lack of intelligence. The trial judge may resort to any examination which will tend to disclose the capacity and intelligence and in the case of an oath, his understanding of the obligation of an oath*. See *Rameswar Kalyan Singh v State of Rajasthan* AIR [1952] SC 54; (1952 Cri LJ 547), *George L Wheeler v United States* 159 US 523, *Krishna Kahar v Emperor AIR* [1940] Cal 182, *Ram Hazoor Pandey v State AIR* [1959] All 409; (1959 Cri LJ 796), *Basu v State of Kerala* [1960] ILR Ker 256, and *Ponnumani v State of Kerala* [1987] (2) Ker LT 1042. Oath or affirmation shall be made by all witnesses, the only exception being the case of a child under 12 years of age where the court is of the opinion that though he understands the duty of speaking the truth he does not understand oath or affirmation. If the court is so satisfied, oath will not be administered to the witness. The evidence will nevertheless be admissible. (Emphasis added.)

[30] Therefore, the issue before this court is whether there was a proper assessment done by the LSJ when she allowed SP7 to testify in court consistent with the guidance expounded the relevant cases mentioned. From the records of appeal and the notes of evidence, the LSJ had embarked on an inquiry where the LSJ had ascertained the age of SP7 and went on to ask SP7 whether he understood the nature of the oath that he took. It was upon being satisfied that SP7 understood the nature of the oath taken that the LSJ allowed the examination of SP7 to proceed. This was carried out by the LSJ despite SP7 being 16 years old on the day he testified.

The Evidence of Child Witness Act 2007 ('the ECWA')

[31] Under s 2 of the ECWA, 'child witness' means a person under the age of 16 years who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence. As such, a person under the age of 16 who is a witness can be subjected to the provisions of the ECWA during the course of investigations.

[32] A child who is an accused person or a child charged with any offence is not subjected to the ECWA but instead, the provisions of the Child Act 2001 shall operate to safeguard the interest of the child in those categories.

[33] It is pertinent to note that a notable feature of the ECWA is the introduction of video recording of a child witness. Section 6 of the Act provides as follows:

> Section 6 Video recording of a child witness
>
> (1) Where a video recording of a child witness is given in evidence, such video recording shall be admitted as evidence of examination-in-chief of the child witness:
>
> Provided that the contents of the video recording shall be subject to the Evidence Act 1950 [Act 56].
>
> (2) A video recording under subsection (1) shall not be admitted unless —
>
> (a) accompanied by a transcript of the original language used in the video recording; and
>
> (b) accompanied by a translation of the transcript, if the language used in the video recording is other than the national language.
>
> (3) A certificate by a person who did the video recording pursuant to subsection (1) shall, until the contrary is proven, be admitted as a prima facie evidence of the authenticity of the content of the video recording.
>
> (4) Where a video recording is admitted under this section, the child witness shall be called to be further examined-in-chief by the party who tendered

the video recording in evidence on any matter which, in the opinion of such party, has not been dealt with adequately in the child witnesses recorded testimony.

(5) Notwithstanding any provision of this Act, where a child witness is called to be further examined-in-chief under subsection (4), he may give evidence by means of having a screen between him and the accused or child charged with any offence or by means of a live link.

(6) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed in the recording shall be treated as if given by that child witness in direct oral evidence.

(7) In the case of a child witness who has been sworn, the Court shall admit the statement made by the child witness in the video recording as sworn evidence.

(8) In the case of evidence of a child witness of tender years, the Court, when considering the statement in the video recording as evidence shall assess and form an opinion as to whether the child witness possesses sufficient intelligence and understands the duty of speaking the truth, though not given upon oath.

[34] As such, the video recording of a child's evidence under the ECWA shall be evidence of the child at the trial and shall be treated as the evidence given in examination-in-chief, similar to viva voce evidence in court. Any further evidence adduced by the examining party (the DPP in a prosecution) during further examination in court shall be part of the child witness's evidence before the court.

[35] In short, the ECWA allows the evidence of a child to be obtained outside the courtroom environment but has the weight of a testimony in court. ECWA provides a similar test to ascertain the competence of a child as provided for in s 133A. This can be seen in s 6(7) and 6(8) of the ECWA.

[36] In adult parlance, a video recording of a child witness giving evidence under the ECWA is similar to a witness statement recorded under s 402B of the Criminal Procedure Code ('the CPC'). Both can be admissible to the like extent as oral evidence to the like effect of the person.

[37] It is the finding of this court that the necessary pre-requisites of s 6 of the ECWA had been fulfilled by the prosecution. The evidence of SP2 and SP6 clearly showed that there was a transcript of the video recording admitted as P9 and the certificate issued by SP6 who made the video recording was admitted as P14 was in conformity with the requirements of s 6(3) of the ECWA. As such, the video recording of SP7's testimony at the CIC can be admitted as SP7's testimony in the trial. This is in addition to the testimony of SP7 during

the further examination-in-chief by the DPP.

[38] Although SP7 had attained the age of 16 at the time of him testifying in court, the recording of his evidence was admissible subject to it being proved as provided under s 7 of the ECWA. The recording was sufficiently proven by the prosecution.

Whether the LSJ had admitted prejudicial and irrelevant evidence

[39] Admittedly, at the trial, this court observes that evidence that were unrelated to the charge were adduced during trial. This included evidence of the incident in Port Dickson wherein the accounts of SP7 being abused by the appellant were part of the contents of P6. There was also the evidence form the investigation offer that had been allowed into the trial which makes mention of other victims who were all students at the Tahfiz. This court is of the opinion that the crucial and most important factor to be considered is whether the LSJ had addressed her mind into focusing on the facts relating to the charge against the appellant.

[40] This court combed through the LSJ's grounds of decision and was satisfied that the LSJ had addressed the issue of needing to focus on the incident that occurred in July 2014 and disregarding the other incidents. The LSJ in no uncertain terms in her grounds of decision mentioned 'Sebelum kejadian bulan Julai 2014 di Pusat Tahfiz tersebut, SP7 ada juga menceritakan kejadian tertuduh menghisap kemaluan SP7 pada tahun 2013 semasa di Port Dickson. Kejadian ini bukanlah pertuduhan di dalam kes ini dan oleh yang demikian, Mahkamah tidak akan memfokuskan kepada kejadian di Port Dickson'. This court is satisfied that the LSJ had addressed her mind on the need to confine her evaluation of the evidence only to the allegations in July 2014 which occurred at the Tahfiz.

[41] On this note, it is also the observation of this court that the LSJ was not in any way swayed by the evidence that were unrelated to the charge against the appellant. Nowhere in her grounds of decision that she factored in the unrelated evidence. She too did not use any of the said evidence to bolster her finding on the conviction against the appellant.

[42] It is also important to mention that the nature of this trial would invariably involve evidence that may not be relevant to the charge but are inextricably related to the sequence of events. It is the role of the trial judge to sieve through the relevant evidence and state as a matter of fact that she or he has consciously focused only on the relevant facts that relate to the charge. This was certainly done by the LSJ. As such, I did not find this argument to be of merit.

Whether SP7's evidence was corroborated

[43] The locus classicus on what amounts to corroborative evidence is the celebrated case of *The King v Baskerville* [1916] 2 KB 658 where Lord Reading CJ said at p 667:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

See also *Sabli bin Adin & Ors v Public Prosecutor* [1978] 1 MLJ 210; [1977] 1 LNS 113; *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220; [1967] 1 LNS 3.

[44] SP7 was not a child of tender years. In addition, the LSJ had embarked on an inquiry of whether SP7 had understood the oath that he took. This means that his testimony can be accepted by the court, subject to the assessment of his credibility just like any other witness. There was no statutory requirement such as that imposed under s 133A.

[45] Whether corroboration of the testimony of a single witness in the case of sexual offences is or is not necessary must depend upon the facts and circumstances of each case. No general rule can be laid down in a matter like this. It ultimately is contingent upon the judicial discretion of the trial judge unless corroboration is insisted upon by statute or is desirable as a rule of prudence, where in the case of a child witness of tender years or of a witness whose evidence is that of an accomplice or the victim is a person of intellectual disability or capacity (see *Mohd Zuki bin Ali @ Mohamad v Public Prosecutor* [2010] MLJU 1320; [2010] 1 LNS 1270; *Vadivelu Thevar v State of Madras* 1957 AIR 614).

[46] The Court of Appeal in *Javad Safikhani v Public Prosecutor* [2017] 3 MLJ 511; [2017] 6 CLJ 604 in discussing the provision of s 134 of the Evidence Act 1950 in the context of the evidence of a single witness and the requirement of corroboration held as follows:

> It is trite law that, where the evidence of a witness does not require to be corroborated in law, there is no need to tender corroborative evidence to support his testimony in court. Such requirement would be in conflict with s 134 of the Evidence Act 1950. This has been illustrated in *Balachandran v PP* [2005] 2 MLJ 301; [2005] 1 CLJ 85 where it been held that:
>
> > Where the evidence of a witness does not require to be corroborated in law, there is no obligation to tender corroborative evidence to support his testimony. Thus, if the case for the prosecution rests solely on the evidence of one witness in such

A a category there is no requirement in law for his evidence to be corroborated. Any such requirement will conflict with s 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for the proof of any fact. This mean that the testimony of a single witness, if believe, is sufficient to establish any fact.

B

[47] This court is of the firm opinion that the testimony of SP7 does not require corroboration. This is primarily due the fact that SP7 gave evidence under oath. It was ascertained by the LSJ that he was a person who understood the nature of taking an oath. As such, there was no requirement under the law C for corroboration.

[48] The LSJ in her analysis held that that SP7's evidence was corroborated by several factors. Among them, the LSJ held that the testimonies of SP1 (the investigating officer) and SP2 (the officer who conducted the interview), D corroborated the testimony of SP7. The LSJ also applied s 157 of the EA when she said that SP7's testimony during the video recording (which was reduced into the form of a transcript) was corroborative in nature.

E **[49]** It was pointed out by counsel for the appellant that the evidence of SP1 and SP2 who were the police officers assigned to the case cannot corroborate SP7 as the statement given by SP7 is not independent evidence that can implicate the victim as they were repeating what SP7 had told them during investigation.

F

[50] It was also contended that the LSJ had wrongly applied s 157 of the Evidence Act 1950 when she ruled that the testimony of SP7 in the video recording during investigation was his previous statement and thus, could be admitted as corroboration. SP7, it was argued, an individual cannot G corroborate himself. *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 was submitted as authority.

[51] This court accepts that there was an error on the part of the LSJ when she readily ruled that the evidence of SP1 and SP2 corroborated SP7. SP1 and H SP2 were merely collecting and collating evidence that came from SP7, the source of the said information. It is not independent evidence that implicates the appellant. To agree with the LSJ would mean any person who is told by a victim of his account of the events is a corroborative witness. This flies in the face of the requirement of *Baskerville*.

I

[52] Similarly, the LSJ fell into error when she held that the evidence of the video recording of SP7 corroborated SP7's testimony. This is contrary to s 6(1) of the ECWA where it stipulates that the purpose of the video recording is to form part of a witness's examination-in-chief.

[53] While this court may accept the argument by counsel for the appellant that the LSJ was in error in the areas mentioned above, it however, does not mean that the entire assessment of evidence and reasoning of the LSJ in this case crumbled. This court is of the view that at best it meant that the evidence of SP7, did not have any corroborative support.

[54] The courts have in the past accepted uncorroborated evidence of victims of sexual crimes. In *Pendakwa Raya lwn Mohamad Malek Ridhzuan bin Che Hassan* [2014] 1 MLJ 363; [2013] 1 LNS 447, the evidence of a single witness victim of 12 years and nine months was accepted as the court was convinced that the complainant was 'unusually convincing'. In such situations, the Court of Appeal held that convictions in sexual cases can be had without corroboration.

[55] The Court of Appeal went on to analyse the rule on the need for corroboration in sexual cases, discussing the cases in Malaysia and India. It is pertinent to reproduce the paragraphs in the said decision. Justice Zawawi Salleh JCA (now FCJ) held as follows:

> [21] Sepertimana juga kes-kes lain di mana keterangan sokongan diperlukan sebagai suatu amalan, sabitan bagi kesalahan kes-kes seksual boleh dibuat tanpa keterangan sokongan dengan syarat mahkamah telah memberi amaran kepada dirinya mengenai bahaya untuk bergantung hanya kepada keterangan tersebut dan berpuashati bahawa adalah selamat untuk mengenepikan keterangan sokongan. Dalam kes *PP v Mardai* [1950] 1 MLJ 33; [1949] 1 LNS 65 Spencer Wilkinson J berkata di ms 33:
>
> > Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated; nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story.
>
> [22] Walau apa pun jua, pada pandangan kami, sekiranya keterangan pengadu adalah 'unusually convincing', sabitan dalam kes-kes seksual boleh dibuat tanpa keterangan sokongan. Kami bersetuju dengan proposisi undang-undang yang dinyatakan di dalam kes *Kwan Peng Hong v PP* [2000] 4 SLR 96 (Mahkamah Tinggi), apabila Yong Pung How CJ berkata di ms 104:
>
> > But I also took great care to make clear that it is dangerous to convict on the words of the complainant alone unless her evidence is unusually compelling or convincing (*Tang Kin Seng v PP* [197] 1 SLR 46 at 58, *Teo Keng Pong v PP* [1996] 3 SLR 32 (at 340 and *Soh Yang Tick v PP* [1998] 2 SLR 42 at 50). In short, the court is to be extremely cautious is relying on the sole evidence of the complainant for a conviction. The phrase 'unusually compelling or convincing' simply means that the complainant's evidence was so convincing that the prosecution's case was proven beyond reasonable doubt, solely on the basis of that evidence.

[56] Although *Abdul Malek* is a case involving the rape of minor, the principle of accepting the evidence of a complainant who is 'unusually convincing' must be applicable to all victims of sexual crimes. This court is of the opinion that SP7, had been consistent in his evidence and withstood the test of rigorous cross-examination. He would fall within the category of an 'unusually convincing' witness.

[57] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 149, the Federal Court held that a judge was entitled to convict even without corroboration if he is convinced of the truth of the complainant's evidence.

[58] Coming back to the current appeal, this court is of the opinion that the entire background of the case needs to be considered. This means the credibility of SP7 in particular. This court has no reason to disbelief SP7. No doubt he was 13 years old at the time the offence was committed against him, never the less, he was able to narrate the sequence of events clearly. There was no sign or evidence that SP7 had attempted to embellish his evidence against the appellant. The incident that led to the charge occurred for a brief moment. SP7, narrated it in clear terms how it occurred.

[59] The additional questions asked by the DPP to SP7 in court too repeats the same description of how the events occurred. It can be summarised that the testimony of SP7 in court was consistent with his narration during the investigation stage at the CIC. Although it contains minor discrepancies especially on the clothing of the appellant and SP7 on the day of incident, it did not render the evidence of SP7 valueless. It is trite that discrepancies in a testimony of witness does not straight away make him an unreliable witness and make the whole of his evidence unacceptable (see *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172; *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63; *Public Prosecutor v Dato' Harun Idris* [1979] 1 MLJ 15).

[60] Given that the video recording obtained under s 6 of the ECWA forms part of the evidence of SP7 and supplemented by his additional answers during the trial, this court is of the considered opinion that SP7 has sufficiently explained what transpired on the day of the incident.

Whether adverse inference should be drawn against the prosecution

[61] Learned counsel for the appellant also argued that s 114 illustration (g) of the EA ('s 114(g)') should be invoked against Bursi a fellow student at the said Tahfiz. It was argued by counsel that Busri was a strong corroborative witness and it was necessary for the prosecution to call the said Busri. It is trite that s 114(g) is only invoked when there is a gap left unanswered in the course

of the prosecution establishing its case.

[62] This court does not find any merit in the argument raised by counsel as the factual matrix of the case revolves around the incident between the appellant and the SP7. There will be no gap in the prosecution case with the failure to call the said Busri. There was no withholding or concealing of evidence by the prosecution. There was no ulterior motive to frustrate the defence. FC in *Ghasem Hozouri Hassan v Pendakwa Raya* [2018] MLJU 601; [2018] 6 CLJ 133 held as follows:

> [48] The law pertaining to s 114(g) of the Evidence Act is settled. Under s 114(g) of the Evidence Act 1950 the court may presume that evidence which could be and is not produced would if produced be unfavorable to the person who withholds it. The usage of the word 'may' gives the discretion to the court whether or not to invoke the adverse inference to a given set of facts. It is not a mandatory inference. *To draw an adverse inference against the prosecution the court must be satisfied that the witness that was not offered was a material witness, the prosecution purposely withhold evidence which it possessed and which was always available; and that what the prosecution did was done with an ulterior motive to frustrate the defence*'. (*Nanda Kumar Kunyikanan& Anor v Public Prosecutor* [2011] 8 CLJ 406).
>
> [49] The aforesaid authority above set out is the correct position of the law, that is, court will not invoke an adverse inference against prosecution if it believes that the facts and/or the prosecution's reasons for not calling the supposed material witnesses show no cause for it. Moreover, the prosecution only needs to produce witnesses who are necessary in the unfolding of its complete narrative, that is, to prove the essential elements of the crime and in this case, custody, control, and knowledge. Applying the above principles to our present case, we are satisfied that there was no evidence to suggest even the slightest inkling that the prosecution withheld testimonies by Javad @ Hasan Tiren and Samaneh Momen in a deliberate scheme to impair the truth or frustrate the appellant's defence. (Emphasis added.)

[63] In the current case, there was no ulterior motive for not producing the witness Busri. The failure to produce the said witness was not in any manner a deliberate scheme to impair the truth or frustrate the appellant's defence.

[64] It however, touches on the discretionary considerations of the prosecution in wanting to prove its case. In so doing, it is solely the prerogative of the prosecution to determine who it intends to call to prove its case. In the case of *Adel Muhammed El Dabbah v Attorney-General of Palestine* [1944] 2 All ER 139; [1944] AC 156 the Privy Council held that the prosecution has a discretion as to what witnesses should be called for the prosecution and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive (see FC in *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222; [1980] 1 LNS 137; CA in *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b; *Samsudin v Public Prosecutor* [1962] 1 MLJ 405). In short, it is a risk that the

prosecution takes in proving its case. However, it does not attract the imposition of any adverse inference against the prosecution.

Whether the defence succeeded in raising a doubt

[65] Based on the above analysis and considering the evidence of the rest of the prosecution witnesses, this court finds that the LSJ had rightly found that a prima facie case being established by the prosecution. The appellant was rightly directed to enter his defence.

[66] Counsel argued that the LSJ had failed to give adequate consideration to the defence of the appellant. It is to be noted that the defence of the appellant was one of alibi. The appellant testified that during the period mentioned in the charge, he was busy helping a friend sell *Roti John* at the local *Bazaar Ramadan*.

[67] The appellant had initially named one Mohd Fakhruz Radzi, the purported owner of the stall the appellant was working for. However, at trial, SD2 instead testified as an alibi witness. He had supported the appellant's version of events that during the fasting month of 2014, he and the appellant were running a *Roti John* stall at the *Bazaar Ramadan*. In cross-examination, SD2 vouched for the appellant's character.

[68] The provision on alibi under the CPC is found under s 402A. The current s 402A of the CPC which came onto effect on 1 June 2012, differs from the repealed s 402A. For ease of reference, both provisions are reproduced below:

Current s 402A

(1) The Court shall, at the time the accused is being charged, inform the accused as to his right to put forward a defence of alibi.

(2) Where the accused seeks to put forward a defence of alibi, he shall put forward a notice of his alibi during the case management process.

(3) Notwithstanding subsection (2), where the accused has not put forward a notice of his alibi during the case management process, he may adduce evidence in support of an alibi at any time during the trial subject to the following conditions:

(a) the accused has given a written notice of the alibi to the Public Prosecutor; and

(b) the Public Prosecutor is given a reasonable time to investigate the alibi before such evidence can be adduced.

(4) The notice required under this section shall include particulars of the place where the accused claims to have been at the time of the commission

of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi. A

Repealed s 402A

(1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support of it *shall not be admitted* unless the accused shall have given notice in writing of it to the Public Prosecutor at least ten days before the commencement of the trial. B

(2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi. C

[69] With the removal of the phrase 'shall not be admitted' (as provided under the repealed s 402A), alibi evidence can be considered even if such notice was not given at case management stage subject to the said notice conforming to s 402A(3)(a) and (b) (see *Amin bin Hatai v Public Prosecutor* [2017] MLJU 98; [2017] 1 LNS 87). In essence, there is no longer the requirement of a ten day notice period. D E

[70] The requirement of what is to contain in the notice remains unchanged. This can be seen in s 402A(2) of the repealed provision and the current s 402A(4). F

[71] The issue before this court is that the defence had produced a witness who was not named in the notice given to the police. The intent of a notice of alibi as can be seen under both versions (repealed and current) of s 402A, is to enable the police to investigate the said notice. Producing a witness who was not named in the alibi notice (SD2), had deprived the police from ascertaining the veracity of the alibi defence. G

[72] The principle on the applicability of an alibi defence remains the same (see *Amin bin Hatai*). In discussing the repealed s 402A, the Supreme Court in the case of *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 1 CLJ Rep 166 His Lordship Harun Hashim SCJ held as follows: H

> It is obvious, however, that an alibi defence will not be a simple statement of: 'I did not do it, I was not there. I was elsewhere'. That would be evidence of a bare denial. To establish his alibi, the accused must disclose where he was at the time of the alleged offence and what he was doing. I

[73] As such, in the current appeal, even if the court is to consider the alibi defence raised, it must be guided by the principles of *Vasan Singh*.

A **[74]** By SD2 saying that the appellant was with him during the fasting month at the *Roti John* stall, it was intended to support the appellant's defence of 'I did not do it, I was not there. I was elsewhere'. This court is of the opinion that without more, this would not pass the threshold set by *Vasan Singh*.

B **[75]** This defence falls into the category of a bare denial. While it is a valid defence, the weight to be attached to it may be minimal (see *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195). In the circumstances, this court is of the opinion that the alibi defence which is anchored to SD2's evidence had failed to raise a doubt on the prosecution case.

C **[76]** SD3 was the mother of the appellant. She testified that the allegation of abuse against the appellant was done by design. SD3 testified that SP4 who was her son in law and one Ustaz Ansori had differences with her husband who was the Mudir (headmaster) of the Tahfiz. SD3 claimed that SP4 was pressuring her D husband to admit molesting students at the Tahfiz. She also said Ustaz Ansori had stolen some cheques from the Tahfiz and had also forged the signature of her husband. In short, there was a conspiracy to defame her husband and her family. This had resulted in her husband also being charged in court for abusing other students.

E **[77]** SD4 was the father of the appellant. In essence, he testified that he had discovered several cheques belonging to the Tahfiz were issued by means of forged signatures sometime in 2016. He said that he lodged a police report and F suspected that the persons involved in the forgery included his staff Usatz Ansori. SD4 also said that SP4 had engineered the issues raised in the Tahfiz as he had a personal agenda. In short, SD4's evidence was about a conspiracy by several persons connected to the Tahfiz. It was meant to tarnish the reputation of SD4 to cover the wrong doings of the said persons at the Tahfiz (forgery of cheques and unpaid personal loans by one Ustaz Rafiq).

G **[78]** Upon considering the defence put up by the appellant and the other defence witnesses, this court is of the opinion that it failed to raise a doubt against the case of the prosecution.

H **[79]** The focus of the case was on the acts done by the appellant. However, the defence failed to raise a doubt on the factual narration given by SP7. This court also perused the reasoning by the LSJ and found that she, as the trier of first instance, had rightly opined that the defence had failed to raise a doubt on I the prosecution case. As such, this court is of the view that the prosecution had proven its case beyond reasonable doubt and that the finding of guilt by the LSJ was correct in fact and law.

Duty of an appellate court

[80] It is trite that an appellate court should be slow in disturbing the finding of facts of a trial judge. The Federal Court in *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79; [1970] 1 LNS 121 posed a question which read as:

> If a magistrate, without misdirecting himself, has made a finding of fact based on actual evidence before him, which finding of fact is corroborated in material particulars by inferences reasonably and properly drawn by him from other evidence adduced before him, such conviction not being against the weight of evidence in the case, is it open to a judge of the High Court on hearing an appeal against such conviction to upset or interfere with such finding of fact?

[81] The Federal Court in answering that question in the negative. It thus clear that that an appellate court should be slow to interfere with the finding of fact by a trial court as an appellate court does not have the advantage of seeing and hearing the witnesses and hence of assessing their credibility.

[82] This court is bound by this principle which has for so long, been the guidance given to appellate courts when considering appeals (see also *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; [1984] 2 CLJ 219; [1984] 1 CLJ Rep 207).

Sentencing

[83] The LSJ had imposed a term of imprisonment of 15 years on the appellant. She had also imposed six stokes of whipping. The law on disturbing sentences passed by trial court have all been settled. An appellate court will not alter a sentence merely for the sake of altering the said sentence even if it was mindful of imposing a sentence different to that imposed by the trial court. Be that as it may, this court finds that the there was no error of sentencing seen. The sentence, after a full trial was reasonable. The crime committed was heinous enough to justify the imprisonment sentence. As such, the imprisonment sentence and the whipping are affirmed.

CONCLUSION

[84] In the foregoing, this court is of the view that the prosecution case was firmly established and that the appellant had failed to raise a doubt on the prosecution case. The appeal must therefore be dismissed. The conviction found by the LSJ and sentence imposed is affirmed.

[85] Order accordingly.

Appeal dismissed, conviction and sentence affirmed.

Reported by Izzat Fauzan